EXHIBIT A
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

Case No.: 3:20-cv-04688

PLAINTIFFS' OPPOSITION TO GOOGLE'S MOTION TO DISMISS OR STRIKE PORTIONS OF THE SECOND AMENDED COMPLAINT

The Honorable Richard Seeborg
Courtroom 3 – 17th Floor
Date: August 19, 2021
Time: 1:30 p.m.

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I. INTRODUCTION

After this Court denied in part Google's motion to dismiss Plaintiffs' First Amended Complaint (Dkt. 109), leaving intact a majority of Plaintiffs' claims—including Plaintiffs' CIPA section 631 claim—Plaintiffs filed a Second Amended Complaint ("SAC", Dkt. 113), adding a breach of contract claim and identifying two additional Google services at issue. There is no basis for Google's current motion to dismiss or strike, and it should be denied in its entirety.

First, Plaintiffs still plead the elements of a CIPA section 631 claim. Google tries to relitigate this Court's holding by mischaracterizing Plaintiffs' allegations, wrongly suggesting that Plaintiffs' factual theory has changed. Google is wrong. As before, Plaintiffs unmistakably plead that Google intercepts users' communications with third-party apps by simultaneously duplicating and transmitting communications to Google without users' consent. There is no basis for this Court to revisit its prior holding.

Second, Plaintiffs state a valid breach of contract claim. This new claim turns on the same conduct and representations this Court considered when it denied Google's motion to dismiss the majority of Plaintiffs' initial claims. Google promised users "control" over Google's collection of their app activity data, and Google invited users to exercise that "control" by toggling off Google's Web & App Activity ("WAA") switch. SAC ¶¶ 68-69. According to Google, WAA "must be on" for Google to "save" "[i]nfo[rmation] about [users'] browsing and other activity on . . . apps . . . that use Google services." SAC ¶¶ 71-72. Relying on these Google statements, this Court held that "Plaintiffs offer a cogent account of why they saw WAA as capable of turning off GA for Firebase's collection of their third-party app data." Dkt. 109 at 10. Google's promises are contractual because they were made in Google's Privacy Policy, which was incorporated into Google's Terms of Service. Google also made these promises in a separate Google webpage that constitutes a standalone contract or is incorporated into the Privacy Policy.

Third, Google's Rule 12(f) motion to strike portions of Plaintiffs' requested relief is foreclosed by basic Ninth Circuit law. "Rule 12(f) does not authorize district courts to strike claims

for damages on the ground that such claims are precluded as a matter of law." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974-75 (9th Cir. 2010).

Fourth, there is no basis to dismiss or strike Plaintiffs' additional allegations regarding Google's data collection with Google's AdMob and Cloud Messaging. As the Court stated, this case is about a "Google technology that, when functioning as advertised in a given app, contravenes the company's user-facing privacy representations." Dkt. 109 at 1. The SAC merely clarifies the scope of the relevant Google technologies. They include, at a minimum, GA for Firebase, AdMob, and Cloud Messaging. Further discovery is needed to assess the full scope of Google's impermissible app activity data collection. In the meantime, there is no basis to dismiss or strike any of these allegations.

II. FACTUAL BACKGROUND

A. Google intercepts Plaintiffs' communications with third-party apps

This case is about Google's interception and collection of highly personal data from consumers' use of over a million software applications ("apps") on their mobile devices. SAC ¶¶ 10, 43-44. Google intercepts communications between users, on the one hand, and third-party (non-Google) app publishers, on the other hand, using software scripts (bits of code) that Google's Firebase Software Development Kit ("SDK") embeds in apps that developers configure to access Google services. SAC ¶¶ 3, 44-59. These services include at least GA for Firebase, Firebase Cloud Messaging, and AdMob. SAC ¶¶ 6-7, 44, 58, 245. For these services, the Firebase SDK scripts intercept, duplicate, and simultaneously transmit to Google data reflecting users' communications with third-party apps, including communications that disclose content that users are requesting an app to display. SAC ¶¶ 49-58; Dkt. 109 at 4.

B. Google promised users control over its collection of this app activity data

Plaintiffs are Google account holders who sought to exercise control over the data generated by their interactions with apps using controls that Google claims to provide for that purpose. SAC ¶¶ 9-10, 202. This data is very valuable to companies like Google. SAC ¶¶ 8, 121-22, 126. But it may also reveal intensely private information, such as health information, sexual

interests, and political views that users like Plaintiffs do not want collected. SAC ¶ 202. To induce such users to continue interacting with apps that use Google services, such as GA for Firebase, Google promised users that they can stop Google from collecting information about those interactions by switching off the WAA toggle. SAC ¶¶ 1-2, 4, 243.

Google made this promise in its Privacy Policy. "[A]cross [Google's] services, [users] can adjust [their] privacy settings to control what [Google] collects and how [their] information is used." SAC ¶¶ 67-68. To exercise this "control," Google specifically directed users to its "My Activity" webpage—where the WAA toggle is located. SAC ¶¶ 69-71. "My Activity" is a feature that "allows [users] to review and control data that's created when [they] use Google services," which Google defined to include "[p]roducts that are integrated into third-party apps" (e.g., GA for Firebase). *Id.*

Google made similar promises in a Google webpage called "See & control your Web & App Activity." SAC ¶ 71. The Privacy Policy directed users to this webpage through a hyperlink inviting users to "learn more here" about the "Web & App Activity control." SAC Ex. A at 26. On the "See & control" webpage, Google represented that WAA "must be on" to "let Google save" "info about your browsing and other activity on . . . apps . . . that use Google services." SAC ¶ 71. Users with Android devices were also presented with the option to switch off WAA using their devices' Settings menu. SAC ¶ 72. Google required Android manufacturers such as Samsung to include the same language about WAA. SAC ¶¶ 4, 61, 63 & n.18.

Based on these promises, Plaintiffs objectively believed that turning off WAA would prevent Google from collecting their third-party app activity data. SAC ¶ 76. Yet Google, through GA for Firebase and other services, continued intercepting users' communications with apps and collecting this data regardless of whether WAA was switched off. SAC ¶¶ 6, 58, 245. Google thereby overrode express controls offered to consumers, making Google's promise of "control" just an illusion. As Google now admits, *nothing* stops Google from collecting this data. SAC ¶ 10; Motion to Dismiss ("Mot."), Dkt. 115 at 1-2.

C. This Court's denial in part of Google's Motion to Dismiss Plaintiffs' First Amended Complaint, and Plaintiffs' subsequent amendment

Google previously moved to dismiss Plaintiffs' First Amended Complaint ("FAC"). Dkt. 62. Plaintiffs' FAC (Dkt. 60) concerned the same data-collection practices and the same Google promises at issue in this Second Amended Complaint. In ruling on Google's prior motion, this Court held that Google "'set an expectation' that it would not save plaintiffs' 'activity on . . . apps . . . that use Google services' unless plaintiffs turned WAA 'on.'" Dkt. 109 at 16 (citations omitted). This Court accordingly denied Google's motion as to the majority of Plaintiffs' claims, including section 631 of the California Invasion of Privacy Act ("CIPA").[1]

Plaintiffs' Second Amended Complaint ("SAC"), according to Google, concerns the "same" "factual allegations" as the FAC. Mot. at 2. That is mostly true. The SAC clarifies which scripts are at issue, and focuses on how Google collects data from users' interactions with third-party apps created with Firebase SDK, notwithstanding Google's promises to users that switching off WAA prevents such data collection. Limited discovery so far shows that the relevant services include at least GA for Firebase, Firebase Cloud Messaging, and AdMob. SAC ¶¶ 6, 58, 245. The SAC identifies the specific Firebase SDK scripts that report to such services, for example, by reference to Google's own documentation about the information those services report. *See, e.g.*, *id.* ¶¶ 50–57.[2] And Plaintiffs' new breach of contract claim relies on the same Google promises at issue in the First Amended Complaint. SAC ¶¶ 236-49.

[1] Plaintiffs' Wiretap Act claim was dismissed on the ground that app developers consented to Google's collection of the data. Dkt. 109 at 10. And Plaintiffs' UCL claim was dismissed on the ground that Plaintiffs did not allege the requisite lost money or property for UCL standing. Dkt. 109 at 17.

[2] Plaintiffs' FAC, perhaps inartfully, used the term "secret scripts" to denote that Google's Firebase SDK causes users' devices to send their app activity to Google without their permission or knowledge. Based on the Court's ruling, the SAC omits the term "secret scripts" and instead explains with the requisite particularity how Google intercepts users' communications with third-party apps and collects their app activity data without their consent through, without limitation, GA for Firebase, Firebase Cloud Messaging, and AdMob.

ARGUMENT

A motion to dismiss must be denied if the complaint "state[s] a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

I. Plaintiffs (Again) State a Claim Under CIPA Section 631

A. Plaintiffs (again) plead that Google intercepted communications in transit

Section 631 of CIPA applies to "[a]ny person who, by means of any machine, instrument, or contrivance, or in any other manner, . . . willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state . . . ." *See also* Dkt. 109 at 13. This Court has already held that "Plaintiffs—as parties to communications that were intentionally intercepted without their consent—state a viable § 631 basis for relief." Dkt. 109 at 13.

Seeking to relitigate this claim, Google raises a factual dispute about how the interceptions occur. According to Google, GA for Firebase does not "intercept" anything but rather "subsequently uploads information to Google." Mot. at 18. Google tries to get around this Court's holding by claiming that Plaintiffs have changed their theory about the "path of the alleged communication." Mot. at 19. That is not true. Plaintiffs' theory has not changed.

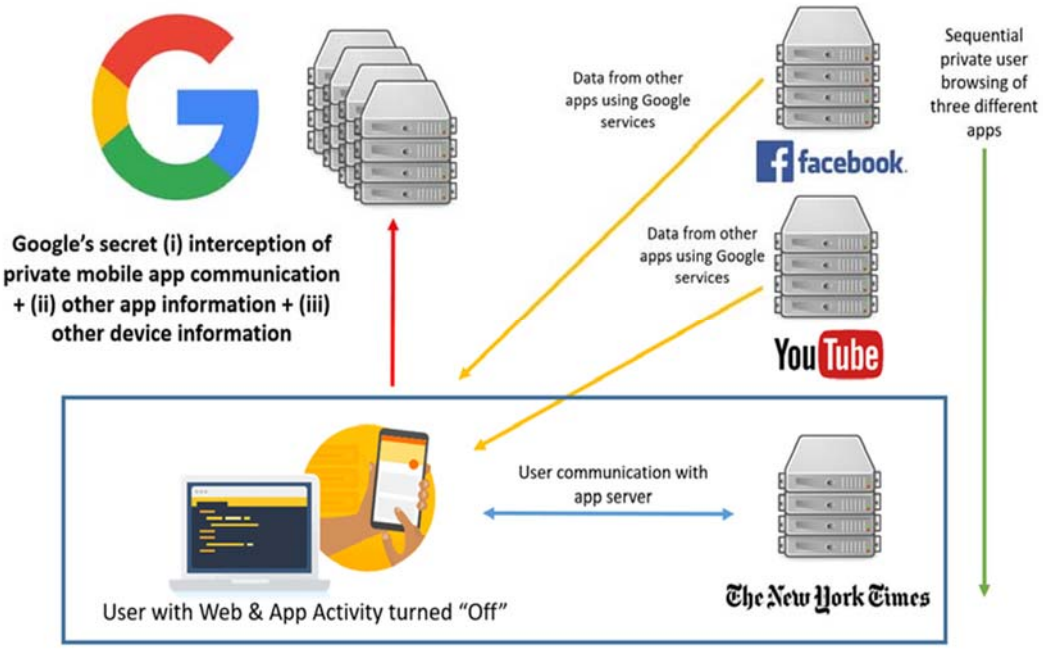
Google's Motion characterizes the path as follows:

User Device → App Developer's Server → User Device → Duplication → Google.

Here is Plaintiffs' actual theory of the path, as alleged in *both* the FAC and SAC:

~~User Device → App Developer's Server →~~ User Device → Duplication → Google.

See FAC ¶ 119 and SAC ¶ 120 (showing the below graphic).



As shown in the graphic, the communication between the user and the app (blue arrow) is intercepted while it is in transit, and the information is simultaneously sent to Google from the *device* (red arrow). *See also* SAC ¶¶ 3, 44, 46, 49, 50, 52, 55, 56, 118.

Google's principal basis for suggesting that Plaintiffs have changed their theory is an edit to paragraph 46 of the SAC. *See* Mot. at 18. Here is the edit:

"The Firebase SDK scripts cause the ~~apps~~ device to intercept these communications . . . ." This edit does not reflect a new theory. This edit clarifies that an app cannot communicate with an app server without going through the mobile device.[3] Paragraph 46 is consistent with the above graphic insofar as both allege that the intercepted communication is duplicated from the device to Google. *See also* FAC ¶ 11 ("The Class Period begins on the date Google first received data . . . *from the device* of a user who had turned off [WAA]." (emphasis added)); *see also* FAC ¶ 119 ("Google collects information from a mobile *device* . . . ." (emphasis added)). Plaintiffs' initial

[3] Surely Google does not dispute that a mobile app cannot request content from the application's app server without going through the mobile device.

Opposition brief made this nuance clear, too: "Google's embedded code ultimately causes the user's *device, not the apps' servers*, to independently send the data to Google." Dkt. 71 at 21.[4]

Google also points out that Plaintiffs removed FAC ¶ 245, which alleged that the "communications between Plaintiffs and Class members and apps were simultaneous to, but separate from, the channel through which Google" intercepted them. This paragraph was part of the Wiretap Act (Count I in the FAC), which was dismissed, and so this paragraph was deleted along with the rest of the paragraphs in that count to make the SAC consistent with this Court's Order. *See* Dkt. 112-5 (FAC-SAC redline). Plaintiffs could amend their complaint to add back this allegation, which Google concedes "alleged simultaneous interception." Mot. at 19.

But doing so is unnecessary. Plaintiffs have squarely pled that the interceptions involve simultaneous duplication and transmission to Google. *See* SAC ¶ 49 (alleging that "Google . . . intercepts the app user's request for that content . . . and . . . *simultaneously* transmits the browsing data to Google servers in California"); *see also id.* ¶¶ 46-58, 118-21. Google's Motion is grounded entirely on a factual dispute that cannot be resolved at this stage. *See In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1036 (N.D. Cal. 2014) ("Yahoo moves to dismiss first on the grounds that § 631 only applies to communications intercepted 'in transit,' and that here the communications at issue were not 'in transit' . . . because the emails were already on Yahoo's servers when Yahoo accessed the emails. . . . The Court must defer resolution . . . until after discovery makes clear where and how Yahoo's scanning technology intercepted the emails.").

[4] Google similarly misrepresents Plaintiffs' allegations about the Google Mobile Service ("GMS") process. These allegations provide no basis to dismiss Plaintiffs' claim. Plaintiffs do not allege that GMS involves a "separate transmission" that "occurs not while the original communication is in transit." Mot. at 18. Instead, Plaintiffs allege that GMS "concurrently aggregate[s] . . . intercepted messages across all the apps using Firebase SDK, so that user identity can be easily tracked across the apps, and so that browsing activity can be immediately associated and correlated for meaningful real-time context." SAC ¶ 54. In any event, Google's arguments about GMS only apply to Android devices, not iOS devices, the latter of which are an additional subclass. SAC ¶¶ 54, 226. The absence of GMS on iOS devices underscores that GMS is not essential to Plaintiffs' allegations that GA for Firebase and other Google services simultaneously duplicate and transmit to Google users' app activity data.

B. Plaintiffs (again) plead that they did not consent

Next, Google again distorts Plaintiffs' theory and misrepresents the Court's Order, suggesting that "Google's presence is known to the user" and that "[b]oth participants [i.e., the app and the user] know Google is transcribing the conversation for the app developer." Mot. at 20-21. Google relies on disclosures made by app developers regarding their use of the GA for Firebase service. Mot. at 20. But these disclosures were presented to this Court on Google's prior motion to dismiss, and the Court only credited them with respect to Google's argument that app developers consented to Google's collection of the data. Dkt. 109 at 10. On the other hand, this Court credited Plaintiffs' understanding that the WAA disclosures "supersed[e] those app-specific disclosures." *Id.* at 8. And Plaintiffs "offer[ed] a cogent account of why they saw WAA as capable of turning off GA for Firebase's collection of their third-party app data." *Id.* at 10. This Court therefore denied Google's motion to dismiss the CIPA section 631 claim. *See id.* at 13 Google's cases are inapposite because they did not involve third parties.[5]

Google tries to evade Plaintiffs' allegations and the Court's Order by claiming that "the logging of user activity data by GA for Firebase on the user's device is not the issue," but it is "whether the recorded communication is sent not only to the app developer but also saved by Google for its own purposes." Mot. at 22 (citing SAC ¶ 50). Plaintiffs, however, allege that Google uses the intercepted data for its own purposes, including to generate profiles on users and direct targeted advertising to them. SAC ¶¶ 112-36. *Graham v. Noom, Inc.*, 2021 WL 1312765, at *5 (N.D. Cal. Apr. 8, 2021), is inapposite because there were no allegations in that case that the third-party "used the [intercepted] data itself." More importantly, *Noom* is distinguishable because the third-party there did not tell the plaintiffs that it would not save their data. "[U]nder section 631(a), if a person secretly listens to another's conversation, the person is liable." *Noom,* 2021 WL 1312765, at *4. Here, Google was a secret listener when WAA was switched off.

Google also takes the wrong lesson from *Noom*. *Noom* does not hold that liability under

[5] *See Warden v. Kahn*, 99 Cal. App. 3d 805, 808-09 (1979) (attorney recorded and used telephone conversations between him and his client); *Rogers v. Ulrich*, 52 Cal. App. 3d 894, 898-99 (1975) (defendant recorded conversations between himself and plaintiff).

CIPA is predicated on the interception "serv[ing] no purpose at all for the primary participant to the communication." Mot. at 21. Nor could *Noom*. That holding would foreclose a CIPA claim any time the interception is achieved by way of embedded code. Yet, as Google acknowledges, *Noom* discussed two other cases involving CIPA claims based on embedded code, just like this case. First, in *Revitch v. New Moosejaw, LLC*, 2019 WL 5485330, at *1 (N.D. Cal. Oct. 23, 2019), the plaintiffs stated a CIPA section 631 claim based on allegations that a third-party service provider "eavesdropped on [plaintiff's] communications with [the] Moosejaw [website] because the code embedded into the Moosejaw.com pages functioned as a wiretap that redirected his communications to [the service provider] while [the plaintiff] browsed the site." The factual allegations here are analogous, and the same outcome is (again) warranted.

This case is also analogous to *Davis v. Facebook*, 956 F.3d. 589 (9th Cir. 2020), which *Noom* also discussed. *Davis* was about Facebook code that caused the users' browsers to generate copies of the user-website communications and transmit them to Facebook "through a separate, but simultaneous channel in a manner undetectable by the user." 956 F.3d at 596, 608. Here, what Google is doing on users' devices mirrors what Facebook was doing on users' browsers. Plaintiffs here allege that the Firebase scripts cause their devices to duplicate and forward to Google's servers communications intended only for the app servers, just like the *Davis* plaintiffs alleged that Facebook code caused their browsers to duplicate and forward messages intended only for website servers. *Id.* at 607-608; *see also* SAC ¶¶ 46-59, 120; *Calhoun v. Google LLC*, 2021 WL 1056532, at *8 (N.D. Cal. Mar. 17, 2021) (plaintiffs stated CIPA section 631 claim based on allegations that embedded Google code copied user-website communications and directed them to Google servers); *Brown v. Google LLC*, 2021 WL 949372, at *15 (N.D. Cal. Mar. 12, 2021) (same). Finally, to the extent Google is arguing that it is a party to the intercepted communications, (Mot. at 19), that argument fails under well-settled law. *See Davis*, 956 F.3d at 608 ("Facebook is not exempt from liability as a matter of law under the Wiretap Act or CIPA as a party to the

communication.").[6]

II. Plaintiffs State a Breach of Contract Claim

"The elements for breach of contract under California law are: (i) the existence of a contract; (ii) the plaintiff's performance or excuse for nonperformance of its side of the agreement; (iii) the defendant's breach; and (iv) resulting damage to the plaintiff." *In re Facebook, Inc., Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d 767, 801 (N.D. Cal. 2019). Google does not deny that its relationship with Plaintiffs is governed by contract, nor contest Plaintiffs' interpretation of many of the provisions comprising the claim. Instead, Google argues that the promises it made in its Privacy Policy and WAA Materials to induce Plaintiffs to use Google's privacy controls and services are not really promises at all.

A. Google's contractual obligations are not limited to the Terms of Service

Google first argues that Plaintiffs' claim should be dismissed because it does not rely on a specific provision within the Google Terms of Service. Mot. at 10. This argument incorrectly assumes that Google's Terms of Service is the only document that establishes Google's contractual obligations. But, as just one example, Google's Terms of Service expressly incorporates other documents, including Google's Privacy Policy—through at least March 31, 2020. *See* Santacana Decl. Ex. 2 at 2 ("Google's *privacy policies* explain how we treat your personal data and protect your privacy when you use our Services. By using our Services, you agree that Google can use such data in accordance with our privacy policies" (italics signifies hyperlink to Privacy Policy)); *id.* Ex. 3 at 2 (same). In another pending case, Google recently confirmed that it "does not dispute that the Privacy Policy was incorporated in the Terms of Service until March 31, 2020." *Brown v. Google*, No. 20-CV-03664-LHK Dkt. No. 208 at 8 n.8 (N.D. Cal. June 29, 2021). When convenient, Google even uses its Privacy Policy as a sword. *E.g.*, *Calhoun*, 2021 WL 1056532, at *8 ("Google contends that Plaintiffs 'consented to Google's [Terms of Service], which

[6] Google correctly describes itself as a "third party." Mot. at 19. Regardless, the Supreme Court of California recently clarified that all of CIPA's prohibitions apply to both participants and non-participants. *See Smith v. LoanMe, Inc.*, 11 Cal. 5th 183, 192-93 (2021).

incorporated Google's Privacy Policy.' Google further argues that Google's Privacy Policy disclosed the alleged data collection."). This Court should reject Google's opportunistic reversal.

Google's cases are inapposite. The plaintiff in *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1117 (N.D. Cal. 2011), based her claim on Facebook's Statement of Rights and Responsibilities ("SRR"). The plaintiff did not argue, and so the court did not consider, whether Facebook breached an obligation in a document either incorporated into the SRR or that stood on its own as an additional agreement. *Bassam v. Bank of America*, 2015 WL 12697873, at *10 (C.D. Cal. Nov. 3, 2015), is even further afield because the plaintiffs did not "specifically plead the terms of the Agreement . . . [n]or . . . attach a copy of the Agreement to the complaint."

B. Google breached a contractual obligation in Google's Privacy Policy

Plaintiffs state a contract claim based on Google's Privacy Policy, which is incorporated into the Terms of Service. The Privacy Policy has, since May 25, 2018,[7] promised users control over the data that Google collects from users' third-party app activity.

- "[A]cross ***our services***, you can adjust your privacy settings to ***control what we collect*** and how your information is used."
- "***Our services*** include . . . [p]roducts that are integrated into third-party apps and sites, like ads . . . ."
- "My Activity allows you to review and ***control data that's created*** when you use ***Google services*** . . . . Go to My Activity."

SAC ¶¶ 5, 66-69, 238-39, SAC Ex. A at 1, 9 (emphases added). As this Court has already held, the definition of Google services "permits the inference that GA for Firebase is a 'Google service'—that is, a '[p]roduct[] that [is] integrated into third party apps.'" Dkt. 109 at 8. And the "Go to My Activity" language in the third bullet contains a hyperlink that brings users directly to the WAA control. SAC ¶ 69.

"[C]ourts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it." *Williams v. Apple Inc.*, 2021 WL 2186223, at *5 (N.D. Cal. May 28, 2021); *see also In re Facebook, Inc., Consumer Privacy User Profile Litig.*, 402 F. Supp. 3d at 789 ("[T]he contract language must be assessed

[7] Earlier versions of Google's Privacy Policy contained similar promises. SAC ¶ 68 & n.20.

objectively, from the perspective of a reasonable . . . user"). Here, a reasonable user could interpret these provisions to promise that My Activity (WAA) can be used to control the data that Google collects through Google's services. That is sufficient. *See Calhoun*, 2021 WL 1056532, at *18 (denying motion to dismiss breach of contract claim because statements in the Chrome Privacy Notice "could have led a reasonable user to conclude that, because they did not sync, Google would not receive their personal information"); *Rodman v. Safeway, Inc.*, 2011 WL 5241113, at *2 (N.D. Cal. Nov. 1, 2011) (denying motion to dismiss "[b]ecause Plaintiff adequately alleges the existence of a contract . . . which is susceptible to Plaintiff's reasonable construction").

Google counters that these Privacy Policy provisions "[a]t most . . . inform[] users that they can adjust their data settings when they use Google services and can review that data; it doesn't commit Google to providing any settings in particular." Mot. at 12. Google errs by seemingly focusing only on the first bullet above while ignoring the others. If that were the only relevant statement in the Privacy Policy, then cases like *In re Google Location History Litigation*, 2021 WL 519380, at *8 (N.D. Cal. Jan. 25, 2021) might be more on point.[8] But the Privacy Policy also identifies "My Activity" (which includes WAA) as a specific feature "allow[ing]" users to "control data that's created" when they use Google services. And a hyperlink in that provision brings users directly to the WAA control. Unlike in *In re Google Location History*, this case is not about whether Google is bound to offer a "particular privacy setting." 2021 WL 519380, at *9. There is no dispute that Google offers the My Activity feature, and Google even admits that "My Activity" includes "the settings" that "form the basis of Plaintiffs' other claims" (i.e., WAA). Mot. at 13. Google breached its contractual obligations because it promised a particular setting (My Activity and WAA) would work a particular way (offering control over data collected by Google), but that was false.

[8] The plaintiffs in that case alleged that "they were misled about the effect of [Google's] Location History setting." *Id.* at *9. But the "only [contractual] provision" they cited was the Privacy Policy's statement that users can "adjust [their] privacy settings to control what [Google] collect[s] and how [their] information is used." *Id.* The Court dismissed the contract claim because that provision "does not actually bind Google to offer any particular privacy settings," let alone apply to the location setting specifically at issue. *Id.*

Block v. eBay, Inc., 747 F.3d 1135, 1139 (9th Cir. 2014), is also off point. *Block* considered a challenge to eBay's process of repeatedly entering bids for a user at predetermined increments until the user reaches a predetermined maximum bid. *Id.* at 1137. The plaintiff claimed that this process breached a provision in the user agreement stating that "We are not involved in the actual transaction between buyers and sellers." *Id.* The court disagreed, reasoning that this provision was part of a Limitation of Liability section that provided a "broad description of the eBay marketplace [] to explain to eBay's users why its liability is more limited than that of a 'traditional auctioneer.'" *Id.* at 1139. Far from attempting to distance Google from responsibility for interactions that users engage in with third parties, the provisions here, by contrast, promised to honor users' choices about the information collected about such interactions by Google.

Google's reliance on *Davis v. Facebook*, 956 F.3d at 610, is also misplaced. The plaintiffs in that case grounded their breach of contract claim on language from Facebook's Data Use Policy, and the court dismissed the claim after concluding that this document was not incorporated into Facebook's SRR. Here, on the other hand, as conceded by Google in other actions, the Google Terms of Service expressly incorporated the Privacy Policy for most of the class period. This case is more like *In re Facebook, Inc., Consumer Privacy User Profile Litigation*, 402 F. Supp. 3d at 801. Those plaintiffs stated a breach of contract claim based on a provision resembling the ones here: "You own all of the content and information you post on Facebook, and *you can control* how it is shared through your privacy and application settings." *Id.* (emphasis added). The promise here is even more explicit, particularly because it identifies My Activity (i.e., WAA) as a specific feature promising control over app activity data. Like the defendant in the *Consumer Privacy User Profile* case, Google breached its promise by "disclos[ing] user information to . . . apps . . . without permission, and without giving the plaintiffs the ability to prevent this disclosure." *Id.*

That Google's Privacy Policy "is meant to help [users] understand what information [Google] collect[s]" does not make it non-contractual. Mot. at 12 (citing SAC Ex. A at 2). Judge Koh rejected that exact argument in *Calhoun v. Google*. The contract claim there relied on the Chrome Privacy Notice, which like the Privacy Policy, describes itself as a resource to "learn how

to control the information that's collected, stored, and shared when you use the Google Chrome browser on your computer." *See Calhoun*, 2021 WL 1056532, at *4. "Google argue[d] that Google did not make promises but rather provided information in [the] Chrome[] Privacy Notice." *Id.* at *19. Judge Koh disagreed, reasoning that the Terms of Service incorporate the Chrome Privacy Notice and explain to users that "[t]hose additional terms become part of your agreement with us if you use those services." *Id.* Here, the Terms of Service likewise incorporated the Privacy Policy: "By using our Services, you agree that Google can use such data in accordance with our privacy policies." Santacana Decl. Ex. 2 at 2; *id.* Ex. 3 at 2. "This language demonstrates that, rather than being an informational resource, the [Privacy Policy] is part of the contract between Plaintiffs and Google." *Calhoun*, 2021 WL 1056532, at *19. Most recently, this Court held that plaintiffs stated a breach of contract claim based on a provision in the Google Privacy Policy describing how "We collect information about your activity in our services." *In re Google Assistant Privacy Litig.*, 2021 WL 2711747, at *11 (N.D. Cal. July 1, 2021); *see also, e.g.*, *McCoy v. Alphabet, Inc.*, 2021 WL 405816, at *12 (N.D. Cal. Feb. 2, 2021) (plaintiffs stated breach of contract claim based on Google's Privacy Policy).

Finally, Google argues that there is a "mismatch between the alleged promise and the alleged breach" because Plaintiffs "don't 'allege that they had no control whatsoever over their' data." Mot. at 13 (quoting *In re Google Location History Litig.*, 2021 WL 519380, at *9). Google once again overlooks the second and third bullets above, which identify My Activity (WAA) as a specific feature allowing users to control Google's collection of their app activity data. "The truth is that Google's so-called 'controls' are meaningless. Nothing stops Google from collecting this data." SAC ¶ 10.

C. Google breached a contractual obligation in the WAA Materials

Plaintiffs separately state a contract claim based on Google's breach of commitments made in the WAA Materials:

- "Info about your browsing and other activity on sites, ***apps***, and devices ***that use Google services***" is "saved as Web & App Activity."
- "To let Google save this information: Web & App Activity must be on."

SAC ¶¶ 71, 240 (emphases added). These commitments appear (1) on a Google webpage titled "See & control your Web & App Activity,"[9] and (2) in the settings menu of Android devices. SAC ¶¶ 240-41.

As this Court has already held in this case: "Google, through the WAA Materials, set an expectation that it would not save plaintiffs' 'activity on . . . apps . . . that use Google services' unless plaintiffs turned WAA on." Dkt. 109 at 16 (alterations in original); *see also id.* at 13 ("[P]laintiffs, pointing to the WAA Materials, plausibly demonstrate an objectively reasonable expectation that their communications with third-party apps would not be recorded by Google" (internal quotation marks omitted)); *id.* at 8 (the Privacy Policy's definition of "Google services" "permits the inference that GA for Firebase is a 'Google service'—that is, a '[p]roduct[] that [is] integrated into third party apps[]'" (alterations in original)).

Because Google can no longer challenge Plaintiffs' interpretation of the WAA Materials, Google now shuns them, arguing that these promises are not part of any contract. Google is wrong. The WAA Materials constitute a freestanding agreement, whether express or implied. Alternatively, they are incorporated into the Privacy Policy and Terms of Service.

1. The WAA Materials are a standalone express contract

Google argues that Plaintiffs did not provide additional consideration for the WAA Materials' commitments beyond what Plaintiffs provided when they agreed to the Terms of Service. Mot. at 14-15. But the Terms of Service did not obligate Plaintiffs to interact with apps that use Google services, let alone apps that may reveal private information such as sexual interests and political or religious views. SAC ¶¶ 202, 243. The promises in the WAA Materials were directed at users who did not wish to have such activity collected by Google, and these promises induced those users to turn off WAA and continue interacting with apps that use Google services. SAC ¶ 243. Google thus gained and retained users who are concerned about their privacy. *Id.*

[9] Google's Motion points out that the name of this webpage has been changed to "Find & control your Web & App Activity." Mot. at 5 & n.3. The relevant provisions, however, have not been altered in any way. Google does not claim otherwise.

Relatedly, Google accrued goodwill by claiming that it was facilitating and respecting users' privacy choices. *Id.*; *see Ansanelli v. JP Morgan Chase Bank, N.A.*, 2011 WL 1134451, at *4 (N.D. Cal. Mar. 28, 2011) ("Under California law, consideration exists even if . . . some small additional performance is bargained for and given. . . . [It is sufficient] if the act or forebearance given or promised as consideration differs *in any way* from what was previously due." (second and third alterations in original) (emphasis added)).

"[T]here are two requirements in order to find consideration." *Steiner v. Thexton*, 48 Cal. 4th 411, 420-21 (2010). First, "[t]he promisee must confer (or agree to confer) a benefit or must suffer (or agree to suffer) prejudice." *Id.* at 421. "[T]he second requirement is that the benefit or prejudice must actually be bargained for as the exchange for the promise." *Id.* Both requirements are met here. Plaintiffs' decision to switch off WAA and continue interacting with apps that use Google services conferred a "benefit" on Google that Google "actually . . . bargained for" in exchange for Google's promise to not collect Plaintiffs' data when WAA was off. *Id.*

Wiskind v. JPMorgan Chase Bank, N.A., 2015 WL 1798962, at *7 (N.D. Cal. Apr. 17, 2015), is distinguishable. That case concerned an alleged breach of a mortgage modification agreement. The plaintiff "fail[ed] to allege consideration" because "he d[id] not state how [the purportedly modified] payments differed from—if at all—the terms of the original [] loan agreement." *Id.* And *Dunkel v. eBay Inc.*, 2014 WL 1117886, at *4 (N.D. Cal. Mar. 19, 2014), is inapposite because the plaintiffs did not even allege how the supposed contractual documents were "incorporated into the User Agreement or how the [documents] themselves constitute a contract." The court therefore did not even mention, let alone discuss, consideration.

2. Alternatively, the WAA Materials form a standalone implied contract

As Google's Motion notes, an implied contract claim has the same elements as an express contract claim. Mot. at 16. "The distinction between express and implied in fact contracts relates only to the manifestation of assent." 1 Witkin, Contracts § 102 (11th ed.). Here, Plaintiffs' conduct (turning off WAA and browsing apps that use Google services) manifested Plaintiffs' acceptance of the deal that Google proposed in the WAA Materials—that users continue interacting with apps

that use certain Google services so long as Google agree not to collect their data. SAC ¶ 244. Google's written commitments in the WAA Materials inform the terms of this implied contract. *See In re Zoom Video Commc'ns Inc. Priv. Litig.*, 2021 WL 930623, at *17 (N.D. Cal. Mar. 11, 2021) (plaintiffs adequately alleged that they and Zoom "entered into implied contracts, separate and apart from Zoom's terms of service," which included alleged misstatements by Zoom about its security capabilities); *Ottolini v. Bank of America*, 2011 WL 8583133, at *3 (N.D. Cal. Dec. 6, 2011) ("[T]here is sufficient information from the parties' alleged conduct and communications . . . from which to infer a contract as alleged by Plaintiff"). The claims in the cases that Google cites were dismissed for reasons that do not apply here.[10]

Google argues that there cannot be an implied contract because an express contract covers the same subject matter. Mot. at 16-17. Yet, in arguing against an express contract, Google claims that the Privacy Policy "doesn't commit Google to providing any settings in particular." Mot. at 12, 14. Google cannot "have it both ways." *See Hickcox-Huffman v. US Airways, Inc.*, 2017 WL 4842021, at *5 (N.D. Cal. Oct. 26, 2017) (rejecting defendant's attempt to argue, on the one hand, that an express contract precluded an implied contract claim while, on the other hand, arguing that the express contract did not bind the company to fulfill the alleged promise). If Google is correct that the Terms of Service and Privacy Policy do not make any enforceable commitments about WAA, then the implied contract does not cover the same subject matter.

Be In, Inc. v. Google Inc., 2013 WL 5568706, at *5 (N.D. Cal. Oct. 9, 2013), which Google

[10] The plaintiff in *Coffen v. Home Depot U.S.A. Inc.*, 2016 WL 4719273, at *5 (N.D. Cal. Sept. 9, 2016), claimed at the hearing that there was a written contract between the parties, but she did not even reference that contract in her pleadings. The plaintiff in *Allen v. Nextera Energy Operating Services, LLC*, 2012 WL 1918930, at *2 (N.D. Cal. May 25, 2012), alleged that his employer breached an implied contract not to fire him without good cause, but the plaintiff failed to allege "any facts regarding when the implied contract took effect, how it was formed, or its specific terms." Here, by contrast, Plaintiffs describe the commitments Google made in the WAA Materials and how Plaintiffs manifested their assent by switching off WAA. And the plaintiffs in *Worldwide Media, Inc. v. Twitter, Inc.*, 2018 WL 5304852, at *6 (N.D. Cal. Oct. 24, 2018), argued that "because they complied with the express terms of their obligations under the [Terms of Service], their compliance require[d] Twitter to comply with [additional] implied obligations." Here, on the other hand, Plaintiffs provided separate consideration for the implied contract.

cites, illustrates the fallacy in Google's argument. In that case, an NDA prohibited Google from "using . . . [the plaintiff's] confidential information . . . except as expressly permitted by the agreement." *Id.* Yet the plaintiff argued that there was also an implied contract that conditioned Google's use of the same information on a separate commitment to license the plaintiff's technology. *Id.* The court dismissed the implied contract claim because the plaintiff's theory resulted in "two competing contracts" covering "the scope of [Google's] permissible use of the information." *Id.* at *6. Here, Plaintiffs reasonably allege alternative theories. If the Court credits Google's position that the Privacy Policy does not make any commitments about WAA, Plaintiffs' implied contract theory does not result in "two competing contracts."[11]

Google's remaining cases are even further afield. The implied contract claim in *Mountain View Surgical Center. v. Cigna Health Corp.*, 2015 WL 5456592, at *2 (C.D. Cal. Sept. 17, 2015), merely "reiterat[ed]" the plaintiff's claim for breach of an oral contract. And Google's citations to *Berkla v. Corel Corp.*, 302 F.3d 909, 918 (9th Cir. 2002) and *Total Coverage, Inc. v. Cendant Settlement Servs. Group, Inc.*, 252 F. App'x 123, 126 (9th Cir. 2007), suggest that Google is confusing quasi-contract (or contracts at law) with implied-in-fact contracts. They are different.[12]

3. Alternatively, the WAA Materials are incorporated into the Privacy Policy and Terms of Service

"For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must

[11] *Be In, Inc.* is further distinguishable because the court relied on a merger clause in the NDA: "This NDA is the parties' entire agreement on this topic, superseding any other agreements. Any amendments must be in writing." *Id.* at *5. Google does not (and cannot) point to an analogous merger clause in the Terms of Service.

[12] "Implied contracts . . . should be distinguished from contracts implied in law, or quasi-contracts." Witkin, Contracts § 103 (11th ed.) "Quasi-contracts have often been called implied contracts or contracts implied in law; but, unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice." *Id.*

be known or easily available to the contracting parties." *Shaw v. Regents of Univ. of Cal.*, 58 Cal. App. 4th 44, 54 (1997). "The contract need not recite that it 'incorporates' another document, so long as it guides the reader to the incorporated document." *Id.* "Indeed, California case law makes it quite easy to incorporate a document by reference." *In re Facebook, Inc., Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d at 791 (N.D. Cal. 2019).

Here, for a large portion of the class period, Google's Terms of Service required users to allow Google to collect data "in accordance with our privacy polic*ies*." Santacana Decl. Ex. 2 at 2 (emphasis on plural); *id.* Ex. 3 at 3 (same). And a hyperlink on "privacy policies" brought users to the Google Privacy Policy, which itself "guide[d] the reader" to the "See & control" webpage, thus incorporating it. *Id.*; *Shaw*, 58 Cal. App. 4th at 54. The Privacy Policy did so by inviting users to click a hyperlink to "Learn more here" about the "Web & App Activity control." SAC Ex. A at 26.[13] That hyperlink brings users directly to the "See & control" webpage. *Id.* Google's claim that the Privacy Policy is "at least three hyperlinks" away from the "See & control" page and that any connection "is far too attenuated" is based on a false premise. Mot. at 15 & n.10. In fact, the "See & control" webpage is just one click away from the Privacy Policy.

Terms of Service → Privacy Policy → "See & control" webpage

In any event, the path Google describes provides another basis for incorporation.[14]

Google's reliance on *Woods v. Google Inc.*, 2011 WL 3501403, at *4 (N.D. Cal. Aug. 10, 2011) is misplaced. The plaintiffs in that case also grounded their breach of contract claim on

[13] The Privacy Policy contained the same language guiding readers to the "See & control" webpage from May 25, 2018 through June 30, 2021—until Google changed the Privacy Policy shortly after Google filed the motion to dismiss the SAC.

[14] The "Go to My Activity" hyperlink in the Privacy Policy brings users to the WAA control, where a "Learn more" hyperlink brings users to the "See & control" page. SAC ¶¶ 69-71.

Also unavailing is Google's claim that Plaintiffs make no effort to show how the Terms of Service is linked to the "See & control" page. Mot. at 15 & n.10. More fundamentally, the Privacy Policy, which is part of the contract, incorporates the "See & control" page. Google does not argue that the Terms of Service must independently incorporate the "See & control" page for that page to become part of the contract.

language in the Google "Help Center"—which includes the "See & control" webpage. The court dismissed the claim, but only because "[t]he complaint refer[red] to more than a dozen [web]pages in . . . [the] Help Center that allegedly identify Google's obligations[,]" which "ma[d]e it difficult to identify the terms of any actual and unambiguous contractual obligations." *Id.* Similarly, in *In re Google Assistant Privacy Litig.*, 457 F. Supp. 3d 797, 832 (N.D. Cal. 2020), the court recognized that it is "certainly possible that statements" on Google Help Center webpages can be incorporated into the Privacy Policy and Terms of Service. But the plaintiffs in that case also relied on "various provisions from different [Help Center] websites." *Id.* And their sole ground for incorporation was a "vague" statement in the Terms of Service, which was "hardly sufficient to establish that the particular websites cited by Plaintiffs" are incorporated. *Id.* Plaintiffs here do not rely on that same "vague" Terms of Service provision, nor do Plaintiffs rely on provisions spread across numerous Help Center pages. Plaintiffs rely on just one Help Center webpage, and thoroughly explain how Google's Privacy Policy guides users directly to that particular webpage.

Google's reliance on *Davis v. Facebook*, 956 F.3d at 610 is also misplaced. The *Davis* court ruled that Facebook's SRR did not incorporate a new Data Use Policy because the SRR directed users to an older version of the Data Use Policy called the "Privacy Policy." *Id.* The problem in *Davis*, a mismatch between the document relied on and the document actually incorporated, is not a problem here. Finally, that Google's Privacy Policy does not identify the "See & control" webpage by its full name is of no moment. "Regardless of how the document is titled, it is enough that the [Privacy Policy] directed [Plaintiffs] to it." *Marchand v. Northrop Grumman Corp.*, 2017 WL 2633132, at *5 (N.D. Cal. June 19, 2017).

III. Google's Motion to Strike Portions of Plaintiffs' Prayer for Relief Should Be Denied

Google's Rule 12(f) motion to strike Plaintiffs' request for non-restitutionary disgorgement and consequential damages is procedurally improper under well-settled Ninth Circuit law. "Rule 12(f) does not authorize district courts to strike claims for damages on the ground that such claims are precluded as a matter of law." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974-75 (9th Cir. 2010); *J. H. v. Cty. of San Mateo*, 2021 WL 1516371, at *4 (N.D. Cal. Apr. 16, 2021)

("The defendants' motion to strike the plaintiff's request for punitive and treble damages on the grounds that there are no factual allegations supporting these damages and that they are unavailable as a matter of law is denied." (citing *Whittlestone*, 618 F.3d at 974-75)). Google relies on *Bureerong v. Uvawas*, 922 F. Supp. 1450 (C.D. Cal. 1996), which was decided fourteen years before *Whittlestone*. "In light of *Whittlestone*, *Bureerong* is no longer good law." *Pallen Martial Arts, LLC v. Shir Martial Arts, LLC*, 2014 WL 2191378, at *8 n.2. (N.D. Cal. May 23, 2014). Google's four other cases did not even involve Rule 12(f) motions to strike. No reference to "strike" nor Rule 12(f) appears anywhere in these cases. *See Darnaa, LLC v. Google LLC*, 756 F. App'x 674 (9th Cir. 2018); *Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024 (N.D. Cal. 2019); *Huynh v. Quora, Inc.*, 2019 WL 11502875 (N.D. Cal. Dec. 19, 2019); *Lewis v. YouTube, LLC*, 244 Cal. App. 4th 118 (2015). Google admits that Plaintiffs here are at least entitled to nominal damages. *See* Mot. at 1. Google therefore does not move to dismiss the contract claim on the basis of the limitation-of-liability clauses.

Even if the Court could strike portions of the prayer for relief, there would be no grounds to do so. The clauses Google cites do not apply to Plaintiffs' claims. The current Terms of Service provides:

> Other than the rights and responsibilities described in this section (In case of problems or disagreements), Google won't be responsible *for any other losses*, unless they're caused by our breach of these terms or service-specific additional terms.

Santacana Decl. Ex. 1 at 11 (emphasis added). Non-restitutionary disgorgement is not a "loss." *See In re Google Assistant*, 457 F. Supp. 3d at 840 ("[N]onrestitutionary disgorgement focuses on the defendant's unjust enrichment."). Google's argument also ignores that the WAA Materials constitute a separate standalone contract.

Equally unavailing is Google's reliance on the pre-March 2020 Terms of Service. *See* Mot. at 23. Google relies entirely on a portion of the second paragraph that purports to limit Google's liability "to the amount you paid us to use the services (or if we choose, to supplying you the services again)." This provision does not apply to users, like Plaintiffs, who do not pay money

directly to Google, and Google instead profits from its collection and use of data. Google's interpretation "would render [the first and third paragraphs of the limitations provisions] surplusage." *Rodman v. Safeway Inc.*, 125 F. Supp. 3d 922, 930 (N.D. Cal. 2015), *aff'd*, 694 F. App'x 612 (9th Cir. 2017). If all users were limited to recovering what they paid to Google, there would be no need to separately clarify that Google is not liable for "lost profits," "indirect" damages, or unforeseeable damage.[15]

Moreover, the phrase, "or, if we choose, to supplying you the services again"—clarifies that the clause only applies to entities that pay Google for services. The GA for Firebase service cannot be "suppl[ied]" to Plaintiffs "again." At best, Google's argument raises an ambiguity as to whether the limitation applies to users like Plaintiffs. But "contractual clauses seeking to limit liability will be strictly construed and any ambiguities resolved against the party seeking to limit its liability." *Safeway*, 125 F. Supp. 3d at 928. Finally, to the extent these clauses are interpreted to prohibit Plaintiffs from recovering any form of damages, they should be disregarded as unconscionable.[16]

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[15] And even if those other paragraphs apply to users like Plaintiffs, they are still irrelevant here because they do not address nonrestitutionary disgorgement. "Although [Google perhaps] could have drafted its limitation provision to achieve the result it now seeks, it did not." *Safeway*, 125 F. Supp. 3d at 930.

[16] "The Ninth Circuit has held that a contract is procedurally unconscionable under California law if it is a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113, 1136-37 (N.D. Cal. 2018). Here, exactly as in *In re Yahoo*, the "liability limitations appear near the end of the 12-page legal Terms of Service document where the Terms of Service are contained in an adhesion contract and customers may not negotiate or modify any terms." *Id.* And with all due respect to Yahoo, it would be far more difficult to navigate today's world without a Google account. Google's interpretation also renders the clauses substantively unconscionable because they would preclude "nearly every type of damages claim." *Silicon Valley Self Direct, LLC v. Paychex, Inc.*, 2015 WL 4452373, at *6 (N.D. Cal. July 20, 2015). "California courts have . . . concluded that limitations are substantively unconscionable when they guarantee[] that plaintiffs could not possibly obtain anything approaching full recompense for their harm." *In re Yahoo*, 313 F. Supp. 3d at 1137. Google's interpretation would preclude not only nonrestitutionary disgorgement and consequential damages, but also Plaintiffs' prayer for compensatory damages, including the value of the data that Google wrongfully collected. SAC ¶¶ 137-58, 248-49, 258.

IV. Plaintiffs' Allegations About AdMob and Cloud Messaging Are Sufficient

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 677-78. Claims need only be "sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it." *ROTFL Prods., LLC v Gzebb*, 2013 WL 12181763, at *2 (N.D. Cal. Aug. 5, 2013). The SAC provides notice to Google that Plaintiffs' claims concern Google's interception and data collection while WAA is turned off in connection with at least three Google services: Google Analytics, Cloud Messaging, and AdMob.

> Google still collects data from users who turn off the "Web & App Activity" feature. Google collects this data through various backdoors made available through and in connection with Google's Firebase Software Development Kit, including not only Google Analytics for Firebase but also without limitation AdMob and Cloud Messaging for Firebase.

SAC ¶ 6; *see also id.* ¶ 245 (Google intercepted the communications "including without limitation by way of Firebase SDK products such as Google Analytics for Firebase, AdMob, and Cloud Messaging for Firebase . . . ."); *id.* ¶ 58. These allegations are sufficient to allow Google to defend against them just as the FAC's parallel allegations concerning Google Analytics were sufficient. Google is of course familiar with AdMob and Cloud Messaging. Google knows what they are and what they do. Google does not deny intercepting communications and collecting Plaintiffs' app activity data with AdMob and Cloud Messaging when WAA is switched off, just like Google has never denied it for GA for Firebase.

Google's focus on whether AdMob is a "Firebase product" is both misleading and misplaced. Mot. at 1, 7. Google's Motion cites a Firebase website, which explains that AdMob is "easily integrate[d] with Firebase." *See* Mot. at 7 n.5 (citing https://firebase.google.com/). Google's reliance on a webpage that supports Plaintiffs' allegations undermines its argument that the allegations "are insufficient to put Google on notice of its wrongdoing." Mot. at 8. Internal Google documents also show that [redacted]

[redacted] GOOG-RDGZ-00021696. [redacted]

[redacted]n

[redacted] GOOG-RDGZ-00028345.

[redacted]

[redacted]

[redacted]

[redacted] GOOG-RDGZ-00028759.

[redacted]

[redacted]

[redacted] GOOG-RDGZ-00022340. [redacted]

[redacted]

[redacted] GOOG-RDGZ-00022342. [redacted]

[redacted]

[redacted] GOOG-RDGZ-00035067.

To be clear, Plaintiffs do not believe these quotes are necessary to give fair notice to Google about two of its own products that are [redacted] Plaintiffs merely clarify that the allegations are fairly based on public and internal Google documents describing the functionality of AdMob and Cloud Messaging. These allegations are not, as Google suggests, "an attempt to resurrect the[] 'secret scripts' theory" and they are not subject to Rule 9(b). Mot. at 8. The secret scripts allegations rose "to the level of outright fraud" insofar as they were "undetectable to anyone but Google" and for Google's "exclusive benefit." Dkt. 109 at 6, 11. Plaintiffs' allegations about AdMob and Cloud Messaging mirror the FAC's allegations about GA for Firebase, which were not subject to Rule 9(b): "Under this theory of liability, GA for Firebase [as well as AdMob and Cloud Messaging]—when running as marketed—allow[] Google to collect information about an individual's 'activity on . . . apps . . .

that use Google services,' notwithstanding" Google's representations about WAA. Dkt. 109 at 6.[17]

Nor are there grounds to strike the AdMob and Cloud Messaging allegations. They are neither "impertinent" nor "immaterial," as Google conclusorily suggests. Mot. at 9. Rather, they "relate[] directly to [Plaintiffs'] underlying claim for relief." *Whittlestone*, 618 F.3d at 974. *Fantasy, Inc. v Fogerty*, 984 F. 2d 1524, 1527 (9th Cir. 1993), is inapposite because the stricken allegations there related to claims that were "barred by the statute of limitations and by res judicata."

V. CONCLUSION

For the foregoing reasons, this Court should deny Google's Motion in its entirety. To the extent this Court believes that certain allegations are deficient, Plaintiffs should be granted leave to amend to correct those deficiencies.[18]

Dated: July 16, 2021

By: */s/ Amanda Bonn*
Amanda Bonn (CA Bar No. 270891)

SUSMAN GODFREY L.L.P.

[17] Because Plaintiffs allege sufficient facts to support their claims, cases such as *Anderson v. Kimpton Hotel & Rest. Grp., LLC*, 2019 WL 3753308, at *5 (N.D. Cal. Aug. 8, 2019), and *Gonzalez v. Uber Techs, Inc.*, 305 F. Supp. 3d 1078, 1090 (N.D. Cal. 2018), where plaintiffs did not plead any facts to support their boilerplate conclusions, are not applicable. Nor is this case like the indirect patent infringement case, *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374, at *2 (N.D. Cal. Sept. 14, 2009). *Elan* involved only "a bare assertion, made 'on information and belief' that Elan 'has been and is currently, directly and/or indirectly infringing, in violation of 35 U.S.C. § 271' the specified patents 'through its design, marketing, manufacture and/or sale of touch sensitive input devices or touchpads, including but not limited to the Smart–Pad.'" *Id.*

[18] "[L]eave to amend shall be freely given when justice so requires, bearing in mind the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities. . . ." *Cal. Spine & Neurosurgery Inst. v. United Healthcare Ins. Co.*, 2019 WL 4450842, at *3 (N.D. Cal. Sept. 17, 2019). "Accordingly, leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith." *Id.* Google's Motion does not claim that any of these reasons are present here. Mot. at 25.

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